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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

NO. 1066

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, FOR THE COUNTY OF WASHOE, THE HONORABLE THOMAS O. CRAVEN, A DISTRICT JUDGE THEREOF, (J. MACARTHUR WRIGHT, REAL PARTY IN INTEREST), *Petitioner,*

vs.

THE STATE OF NEVADA, *Respondent.*

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Attorney for Respondent.

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NEVADA SUPREME COURT'S OPINION ON APPLICATION FOR WRIT OF HABEAS CORPUS

On November 8, 1967, the Nevada Supreme Court issued and entered a writ prohibiting the state district court from hearing

a second petition for writ of habeas corpus filed by petitioner before trial. This writ is attached as Appendix B of petition. The reason for its issuance was to prohibit the district court from hearing identical matters presented to the state supreme court, which decided on September 25, 1967, that the contentions were without merit or substance. Appendix A of petition.

JURISDICTION

We respectfully submit that petitioner has failed to show that this court has jurisdiction of this case, for the following reasons:

I.

1. The issues raised in the above-entitled cause were argued and submitted to the Nevada Supreme Court, and an opinion was rendered and judgment entered on September 25, 1967, by that court. *State of Nevada v. W. Mark Eddington and J. MacArthur Wright*, 432 P.2d 87, and attached as Appendix A to petition.

2. The petitioner is apparently seeking certiorari from a permanent writ of prohibition issued by the Nevada Supreme Court on November 8, 1967, and attached as Appendix B to the petition. That court prohibited the state district court from hearing a second petition for writ of habeas corpus filed by Mr. Wright because the matters alleged had been previously presented to the Nevada Supreme Court and found to be without merit or substance by its September 25, 1967, decision.*

3. The issues raised in the present petition disclose that petitioner is actually seeking certiorari from the September 25, 1967,

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*The petition for certiorari in this case was captioned J. MacArthur Wright, Petitioner, v. The State of Nevada, Respondent, and changed to the present caption by order of the Clerk of the United States Supreme Court.

decision of the Nevada Supreme Court. This is an improper attempt to do indirectly that which petitioner is precluded from doing directly because of time limitations.

4. The petition was filed January 30, 1968, more than ninety days since the entry of judgment by the Nevada Supreme Court on September 25, 1967. The period for applying for a writ of certiorari has not been extended by a Justice of this court (Rule 22(1) of this court).

II.

The petitioner has failed to comply with Rule 23(f) of this court. Among other matters, he has failed to specify the state of the proceeding in the state court. The state is still attempting to get to trial to have the guilt or innocence of the defendants determined in a court of law. To this extent we do not have a final judgment, as the matter is not concluded. The jurisdictional requirement of finality does not appear to be present.

III.

If it is not clear from the record whether the state supreme court has decided a federal question by its decision, September 25, 1967, Appendix A to petition, the petitioner has failed to acquire a certificate from the state court that question was raised and decided. The following is found in Stern and Gressman, Supreme Court Practice, pp. 102, 103 (1962 Ed.):

> "As has been noted, it is essential to the exercise of the Supreme Court's jurisdiction under § 1257 that a substantial federal question be raised before the highest state court. If the federal question was explicitly decided, the Supreme Court assumes that it was properly raised. But if the question was ignored by the highest state court, the litigant is

then called upon to demonstrate that the question was properly and timely raised.

"It may not always be clear from the record that the federal question was raised before the highest state court or necessarily decided by it. The practice has therefore developed in doubtful cases of obtaining a certificate from the highest state court to the effect that a federal question was raised and decided. * * *"

QUESTION PRESENTED

The respondent contends that because of untimely filing, the only question presented by this petition is whether a state supreme court, by use of a writ of prohibition, may effectively suspend the use of a writ of habeas corpus when the petition for writ of habeas corpus is employed in the manner disclosed in this case. However, we will respond in our argument to all of petitioner's contentions.

STATEMENT OF THE CASE

On October 23, 1967, petitioner filed the petition for habeas corpus attached to petition as Appendix C. On November 8, 1967, the Nevada Supreme Court issued a permanent writ prohibiting the state district court from considering or acting on this petition. Appendix B of petition. The Nevada Supreme Court recited in this writ of prohibition that it had determined that the matters presented by the petition for writ of habeas corpus (attached to the petition herein as Appendix C) had been previously presented to the Nevada Supreme Court and found to be without merit or substance. See Exhibit A of petition. Petitioner now seeks certiorari of the November 8, 1967, writ of prohibition, and seeks to raise issues determined by the Nevada Supreme Court in its decision of September 15, 1967, whereby it remanded the case back for trial. The case is pending trial.

ARGUMENT

Response to Petitioner's Questions 1 and 2

Petitioner contends the prosecutors were prejudiced against the defendants; that they conducted themselves in an improper manner before the grand jury and introduced improper evidence. The Supreme Court of the State of Nevada, by unanimous decision, determined, after study of the transcript, that these contentions were without merit or substance. Appendix A and B to petition. The allegations are made through an exculpatory ex parte affidavit. Appendix C to petition.

If the defendants had succeeded in their attempts to hold a hearing in the state district court on these allegations, they would have effectively been allowed to try the prosecutors before they went to trial themselves. The state, by the nature of the allegations, had been placed on the defensive and the defendants, through this and other similar tactics, have been able to avoid trial to date. To a great extent, the due administration of criminal justice has been delayed by these legal maneuvers of the defendants. Even if the allegations were true, which we strenuously deny, and the Supreme Court of Nevada found to be untrue, a constitutional issue has not been raised. If it were the law that a criminal defendant could be denied due process as contended, we could envision a situation wherein every prosecutor in every criminal case could be placed in a position of defending his integrity and motives at a hearing set for that purpose prior to trial, and resulting from allegations made by a criminal defendant, whether they be true or false.

Although difficult to understand, this is exactly the position into which the state was placed after the Supreme Court of Nevada had ruled, adversely to the defendants, on a previous writ of habeas corpus presenting the same issues. The defendants

have presented no law applicable to their argument. There is none. *Giles v. Maryland*, 386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793, concerned a prosecutor who suppressed evidence at trial that may have exonerated the defendant. We have not been to trial in the instant case, and if we knowingly suppressed evidence of innocence, we not only should be reversed, but disciplined. In regard to the present allegation, we can only state that we do not have any evidence that would prove the innocence of the defendants of the crime charged, nor did we present any false evidence to the grand jury to our knowledge then or now.

The Nevada Supreme Court may and did suspend the use of a writ of habeas corpus in proceedings involving a second and successive petition raising the same questions previously presented and determined.

> "Nothing in traditions of habeas corpus requires federal courts to tolerate needless piecemeal litigation, or entertain collateral proceedings whose only purpose is to vex, harass, or delay." *LeClair v. U.S.*, 241 F.Supp. 819 (D.C. Ind. 1965)
>
> "Second and successive petition for writ of habeas corpus need not be entertained unless it raises questions not previously presented and determined." *Walker v. Taylor*, 338 F.2d 945 (C.A. Kan. 1964)
>
> "Where petition for writ of habeas corpus is repetitious of previous petitions it should be dismissed." *Com. ex rel. Huber v. Myers*, 146 A.2d 666.

Response to Petitioner's Question 3

The Supreme Court of Nevada has determined that there was a mass of legal evidence presented to the grand jury in this case to sustain the indictment and, in fact, enough to justify a belief that, absent explanation or contradiction, a trial jury could lawfully convict the defendants. Appendix A to petition. The

defendants in this case have been accorded privileges beyond those established as constitutional rights by this court.

It is now settled by the decision of the United States Supreme Court in *Costello v. United States* (1956), 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, that an indictment is not open to challenge in a federal court on the ground that it is based solely upon incompetent evidence. The actual holding was that an indictment cannot be challenged on the ground that only hearsay evidence was presented to the grand jury. The Court observed that "if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed"; that "the result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

The defendants have had a preliminary trial on the competency and adequacy of the evidence before the grand jury, plus a state supreme court ruling on the issue. They have sought, and continue to seek by this petition, other preliminary trials on issues already disposed of.

Nevada evidentiary requirements and this record disclose that the defendants have been accorded rights completely beyond those necessary under federal law. Perhaps even to the extent of permitting the state to be substantially hindered in its attempt to fulfill obligations imposed upon it by law.

Under federal law the question generally could not be reached until after trial. A grand jury transcript is allowed to a defendant only where there is a compelling need for such disclosure and the disclosure is required by the ends of justice.

In Nevada, a criminal defendant is allowed a copy of the transcript as a matter of course. *Shelby v. Sixth Judicial District*

Court, 82 Nev. 204, 414 P.2d 942 (1966); *Ivey v. State*, 82 Nev. 449, 420 P.2d 853 (1966).

A federal question is not presented under this contention even if we were past the trial and convictions secured.

> "Allegations of insufficiency of the evidence and incompetency of minor witnesses are not matters which are reviewable by writ of habeas corpus in federal courts with respect to state conviction." *Dotson v. U.S.*, 314 F.2d 50 (C.A. Cal. 1965)

Response to Petitioner's Question 4

Petitioner asserts he was denied his constitutional rights because the grand jury refused to hear his testimony, pursuant to written requests attached to petition as Exhibits A and B. He cites no law for this position. Federal law not only denies any such right, but forbids any attempt to influence a grand jury by the sending of any letter relating to any matter pending before them.

In *Duke v. United States*, 90 F.2d 840 (4th Cir. 1937), it was stated:

> "There is no right on the part of one whose conduct is being investigated by the grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise; and it is important that the processes of criminal justice be not thus interfered with by those who have reason to think that their conduct is under investigation. Congress, for the protection of grand and petit juries from this sort of interference, has not only forbidden attempts to influence them corruptly or by threat of force, or by any threatening letter or communication, but has also forbidden any attempt to influence by the sending of any letter relating to any matter pending before them. It makes no difference that the letter here is addressed to the grand jury as a body instead of a particular juror. * * *

> "* * * And one who knowingly sends a letter to a grand jury which shows upon its face the intention that it shall be considered with respect to a pending case, cannot be heard to say that he did not attempt to influence the jury thereby, as the attempt to influence is inherent in the act of knowingly sending such a letter."

In *United States ex rel. Gene McCann v. D. E. Thompson*, 144 F.2d 604, the defendant claimed it was error of the grand jury to refuse to allow him to appear before it as a witness. The court said:

> "To this privilege he was not entitled. The practice was utterly unknown at common law and, although grand juries have in recent times occasionally invited persons, whose conduct they are examining, to appear, they are never obliged to do so."

Response to Petitioner's Question 5

Although petitioner has not, as yet, been brought to trial, he asserts he has been denied a speedy trial. The prosecution has done everything within its power to get this case to trial. We have responded to every motion, demurrer, and writ promptly and on time. We have sought no postponements and have made no motions that may have caused any delay in the trial.

Pursuant to order of the Nevada Supreme Court, recited on page 3 of Appendix B of petition, petitioner specifically waived any rights which could accrue to him by virtue of the trial date being set for July 1, 1968, although he recites he does not waive any rights which may have accrued prior to date of arraignments. (Record p. 302) He obviously does not desire to go to trial before July 1968 and has resisted all attempts of the state to set an early trial.

Even absent the waiver of the 60-day rule as described in the

record on page 302, petitioner has not been denied his constitutional rights. If anything, the state has been denied an early trial. Although *Klopfer v. State of North Carolina*, 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988, may apply the right to a speedy trial to the states through the 14th Amendment, the factual situation of the instant case does not resemble that which was presented in the Klopfer case and the justification for asserting violation of constitutional rights.

> "The right to a speedy trial in Nevada is legislatively given. The 60 day rule therein prescribed has flexibility. If the defendant is responsible for the delay of trial beyond the 60 day limit, he may not complain." *Oberle v. Fogliani*, 82 Nev. 428, 420 P.2d 251 (1966).

Any delay in the trial of this case has been caused by the defendants.

Response to Petitioner's Question 6

Petitioner contends he has been placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States. Jeopardy does not attach in this case. The contention is premature and the question cannot be raised in a habeas corpus proceeding.

> "Jeopardy does not arise until after the (trial) jury is properly impaneled." Wharton, Criminal Law and procedure, § 138 (1957 Ed.); *Conero v. United States*, 48 F.2d 69 (9th Cir. 1931).
>
> "The defendant is not placed in jeopardy when the (first) indictment is void." Wharton, Criminal Law and Procedure, § 139 (1957 Ed.).
>
> "Grand jury may on the evidence already received on the finding of an indictment, return a second indictment for the purpose of correcting a defect of form." Wharton, Criminal Law and Procedure, § 1735 (1957 Ed.).

"The issue of double jeopardy cannot be raised by a habeas corpus proceeding." *Barker v. State of Ohio*, 328 P.2d 582 (6th Cir. 1964).

CONCLUSION

The petitioner is untimely in filing his petition for certiorari and has not shown that he has been denied any right, privilege or immunity as guaranteed by the Constitution of the United States. He seeks review from the wrong decision and has not shown where there is any decision of the Nevada Supreme Court that is in conflict with a decision of this court. Respondent respectfully requests that the petition be denied.

Respectfully submitted this 22nd day of February, 1968.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Respondent.